

NO. 22343

In The

UNITED STATES COURT OF APPEALS

For The Ninth Circuit

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ANGUS J. DE PINTO,

Appellant,

v.

HJALMAR B. LANDOE, FRANCIS I. SABO,  
and EDWIN B. PEGRAM,

Appellees.

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APPELLANT'S REPLY BRIEF

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In response to our Opening Brief, appellees advanced the premise that where tortfeasor A is primarily liable to plaintiff for negligence, he cannot recover indemnity from joint tortfeasor B. They point out that this Court held (now res judicata) that the jury was warranted in finding that DePinto's abdication of his duties as a director of United constituted negligence proximately causing, or contributing to, the loss sustained by United as a result of the October 18, 1957 transaction. Appellees then draw the conclusion that because DePinto's negligence proximately



caused the loss to United, he must be deemed to be "primarily" liable, and therefore, precluded from seeking indemnity.

The basic fault in appellees' argument lies in the premise--the equating of negligence with primary liability. It is true that the right to indemnity is enjoyed only by a tortfeasor who is "secondarily" liable; but liability based upon negligence--neglect of duty--often (and in this case) gives rise to "secondary" liability. In the case of Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368, 24 A.L.R.2d 319, which was cited by the Supreme Court of Arizona in both the Blakely Oil<sup>1</sup> and Busy Bee<sup>2</sup> cases, the Supreme Court of Pennsylvania stated:

"Without multiplying instances, it is clear that the right of a person vicariously or secondarily liable for a tort to recover from one primarily liable has been universally recognized. But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of the failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible."  
(Emphasis supplied.)

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<sup>1</sup> 292 P.2d 842

<sup>2</sup> 82 Ariz. 192, 310 P.2d 817



In Busy Bee, the Supreme Court of Arizona held that the buffet was liable to the plaintiff because it "was guilty of negligence in failing to maintain the passageway in a reasonably safe condition for those making deliveries to it." The Court pointed out, however, that "the buffet was guilty of no active fault in creating the danger to Ferrell. Its negligence was passive or static. Its negligence was incapable of producing injury to anyone at that time except through the active negligence of another." The buffet was allowed indemnity from its joint tortfeasor because its liability, though based on negligence--was secondary. That is the situation here. DePinto had a fiduciary duty as a director to "discover or correct or remedy a dangerous condition caused by the act of the one (appellees) primarily responsible." His negligence in failing to pay any attention to the affairs of United was "passive or static". His negligence "was incapable of producing injury to anyone at that time except through the active negligence of another (appellees)."

Let us assume that the cashier of a bank consistently neglected to have any audits made of the books with the result that one of the bank's employees was able to embezzle a million dollars over the period of the cashier's neglect. Would anyone suggest that when the negligent cashier was required to make good the loss, he could not seek indemnity from the embezzler? Does DePinto's position



here differ from that of the negligent cashier? The specific rule applicable to this situation is found in the A.L.I. Restatement, Restitution 413 § 94:

"A person who has become liable in tort to another because of an injury caused by his negligent failure to protect the other's person or property from the tortious conduct of a third person is entitled to indemnity from such third person for expenditures properly made in the discharge of such liability, if the payor could have recovered from the third person for an injury so caused to himself or to his own property.

"Comment:

"a. The rule stated in this Section is applicable to situations in which, because of the relation of two parties, one of them is under a duty of protecting the other or the interests of the other from harm. Thus the rule is applicable to a trustee, agent, bailee or other fiduciary liable to the beneficiary or bailor because of his negligence in failing to protect the subject matter from intentional harm done by a third person or from trespass or conversion committed by mistake. It applies likewise to a carrier who is under a duty to protect passengers from assaults and acts of others. In such cases the fact that the claimant committed a breach of duty to the injured person does not bar him from maintaining a tort claim against the person doing the harm or from a right to restitution from such person."

DePinto became liable in tort to United because of an injury caused by his negligent failure to protect United's property from the tortious conduct of appellees. He is entitled to indemnity from appellees for expenditures properly

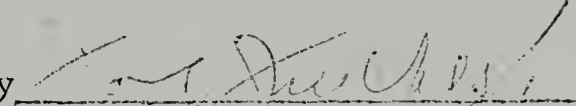


made by him in the discharge of such liability. The judgment of the lower court must be reversed.

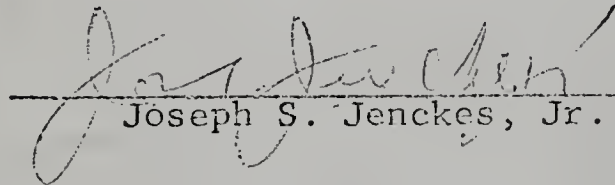
Respectfully submitted,

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By

  
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J. DePinto)

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

  
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A true copy of the foregoing Appellant's Reply Brief served, via First Class Airmail, postage prepaid, this 9th day of April, 1968, upon:

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